Filed 8/25/04 Sivsa Entertainment v. World Intern. Network CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SIVSA ENTERTAINMENT, Plaintiff, Cross-defendant and Respondent, v. WORLD INTERNATIONAL NETWORK, Defendant, Cross-complainant and Appellant.	B164377 (Los Angeles County Super. Ct. No. BC274291)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. Grimes, Judge. Affirmed.

Lavely & Singer, Brian G. Wolf and Allison S. Hart for Defendant, Cross-complainant and Appellant.

Spolin Silverman Cohen & Bartlett, Troy H. Slome and Brian E. Shear for Plaintiff, Cross-defendant, Respondent.

This appeal is from the trial court's granting of plaintiff's anti-SLAPP motion.[1] A cause of action for breach of contract in the cross-complaint of World International Network, LLC (WIN) was stricken, and WIN contends that the ruling in effect permits Code of Civil Procedure section 425.16 to be used by a party to a private contract to avoid its contractual obligations.[2] Concluding that the challenged cause of action falls within protected activity and that WIN has not demonstrated a probability of prevailing on its claim, we shall affirm the trial court's order.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Plaintiff Sivsa Entertainment, S.A. (Sivsa), a Spanish company that initially did business with WIN, invested $2 million in WIN and received shares as a member of WIN.[3] Sivsa entered into a restated operating agreement dated November 1, 1998, which WIN contends governs the relationship between WIN and its members. Paragraph 16 of the 1998 operating agreement provides that the Members "hereby waive their right to

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[1] WIN also filed a notice of appeal from the trial court's order denying WIN's motion to stay action and compel arbitration. WIN does not pursue that appeal because Sivsa subsequently agreed to submit to arbitration. WIN informed this court that it withdrew the portion of the appeal on the ruling regarding arbitration, and we dismissed that part of the appeal as moot on February 4, 2004.

"The acronym SLAPP was coined by Professors Penelope Canan and George W. Pring. (See generally Canan & Pring, Strategic Lawsuits Against Public Participation (1988) 35 Soc. Probs. 506.)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85 (*Navellier*).)

[2] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

[3] The other members of WIN are WIN's founders and managing members, Larry and Anita Gershman (the Gershmans), who own an 83 % interest in WIN, and a WIN employee not a party to the action, who owns a 2 % interest in WIN. Sivsa made a capital contribution of $2 million, thereby acquiring a 15 % interest in WIN.

initiate or assert . . . judicial dissolutions of the Company . . . ."[4] Sivsa later loaned another $350,000 to WIN.

When Sivsa demanded the return of its equity investment, alleging that the Gershmans diverted WIN's assets to themselves, WIN responded that the investment could be repaid only according to the terms of the agreement. Sivsa, which characterizes the dispute as due to mismanagement of WIN by the Gershmans, sued WIN and the Gershmans, seeking judicial dissolution as well as asserting causes of action for breach of fiduciary duty, breach of contract, declaratory relief and inspection of company books and records.

WIN demurred, and the Hon. David Horowitz sustained WIN's demurrer with leave to amend to the cause of action for dissolution, finding Sivsa had contractually waived its rights to seek judicial dissolution of WIN.[5] Sivsa filed its First Amended Complaint (FAC) against WIN and the Gershmans. Allegations regarding the relevant agreements between the parties include assertions that the agreement, including Paragraph 16, was drafted by defendants, who gave plaintiff Sivsa only an opportunity to accept or reject the entire agreement, including the exemption for liability provision. Moreover, the defendants allegedly threatened Sivsa that WIN would not continue to

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[4] The validity of Paragraph 16 is raised in this appeal, WIN arguing that the provision precludes Sivsa's action for judicial dissolution and Sivsa claiming the provision is against public policy and violates governing statutes. Paragraph 16 provides in full: "The Members hereby waive their right to initiate or assert class actions on behalf of the Members, derivative actions on behalf of the Members, derivative actions on behalf of the Company, judicial dissolutions of the Company, or dissenter's rights." The restated 1998 agreement, entered into on November 1, 1998, was to take effect as of January 1, 1999.

[5] Sivsa had argued that the right to seek dissolution of a limited liability company cannot be modified or waived pursuant to Corporations Code sections 17005, subdivision (b), and 17103. The court concluded that no statute or case had been cited that precluded Members from waiving their right to bring a judicial dissolution action and that paragraph 16 of the governing operating agreement contained such a waiver.

deliver motion pictures unless Sivsa executed the agreement and invested capital into WIN; Sivsa allegedly was not represented by an attorney; Sivsa did not have access to American law; and defendants assured Sivsa the agreement was a standard contract and it was unnecessary for Sivsa to "scrutinize" the agreements, which was characterized as protecting plaintiff's interests; and a Spanish translation was not provided to Sivsa, whose principals do not speak English.[6] Furthermore, Sivsa alleged that Paragraph 16 was void as against public policy, Civil Code section 1668.

The action was reassigned to Hon. Elizabeth A. Grimes, who overruled WIN's demurrer to the first cause of action[7] to the FAC. The trial court reasoned in its minute order:

"The Beverly-Killea Limited Liability Company Act does not make clear whether a waiver of the right to seek dissolution of a limited liability company ("LLC") is enforceable. Corporations Code section 17350 provides that an LLC may be dissolved as provided in the articles of organization or the operating agreement, or by a vote of at least

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[6] In its second demurrer, WIN contended that Sivsa's own discovery responses contradicted many of these allegations. In the article written by WIN's counsel accompanying correspondence to Sivsa, attorney Schuyler M. Moore wrote regarding the contents of operating agreements: "Perhaps a statement waiving the members' right to initiate (a) class actions on behalf of the members, (b) derivative actions on behalf of the LLC, or (c) *judicial dissolution of the LLC, although it is not entirely clear whether such a waiver is enforceable*." (Italics added.) The trial court did not take judicial notice of this document.

[7] The demurrer was again based on the waiver in paragraph 16 of the operating agreement. Sivsa's opposition argued that the waiver provision violates public policy and is unenforceable as a matter of law under Civil Code section 1668; is unenforceable as an unconscionable contract provision under Civil Code section 1760.5; and plaintiff has not waived its right to seek a judicial dissolution of WIN pursuant to Corporations Code sections 17005, subdivision (b)(3) and 17103, subdivision (c). Further, Sivsa argued that the exhibits attached to WIN's request for judicial notice, including the article by attorney Schuyler M. Moore, were not admissible and, in any event do not contradict the claims in Sivsa's complaint. The trial court took judicial notice of the operating agreement but not any of the other evidence "which is subject to factual disputes."

a majority of the members, or by a decree of judicial dissolution. Section 17351 sets forth the grounds for a decree of judicial dissolution and permits the other members to avoid dissolution by either litigating the dissolution action or by buying out the membership interests of the member seeking dissolution. Neither party has cited any controlling statute or case law on point establishing whether or not the right to seek a decree of judicial dissolution may be waived. The court has doubts as to whether it serves public policy to enforce such a waiver. A minority member who recognizes that the LLC has been abandoned or who recognizes that management is deadlocked or who has been defrauded must have some remedy. If the majority members seek to bar judicial intervention in the affairs of the LLC, the majority can buy out the minority's shares; but if the waiver is enforced, then the minority member is without recourse to any remedy."[8]

While the demurrer was pending, WIN cross-complained for inter alia breach of contract (fourth cause of action); Sivsa's alleged breach of the operating agreement was

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[8] The trial court's oral comments at the hearing were far more equivocal. Judge Grimes stated: "*I didn't have the resources in chambers to do that research* [whether a privately held corporation could compel a shareholder to waive a right to derivative action] . . . and the complete absence of any authority on point and with nothing more than principles of statutory interpretation . . . I was not inclined to sustain the demurrer for the reason that I stated, that if I were to enforce the waiver, then you could create a completely (*sic*) quagmire and that doesn't seem to me what the Legislature intended. [¶] The Legislature seemed to have intended to either give a minority an opportunity to bring a court action, or if the majority didn't want a judge to be interfering or a jury to be interfering with conduct of the LLC, then they could bind that up. And if there was a dispute about that, there was a procedure to resolve the price; but to just freeze them, that doesn't seem to me to make sense. [¶] Again, *I just don't know what the answer is. But since I wasn't confident what the answer is, I didn't want to sustain the demurrer.* That's my perfectly candid reason." Moreover, "I just am not going to be the trailblazer that enforces this waiver clause." (Italics added.)

The court invited counsel to take a writ, stating "I don't know what the answer to this question is. And I don't see a clear public policy reason why we should enforce the waiver." This Division denied WIN's petition for writ of mandate (B163853) challenging the overruling of the demurrer, with the notation "(See Corp. Code, § 17005, subd. (c); cf. § 17351.)"

its filing a lawsuit for dissolution and liquidation contrary to Paragraph 16.[9] Days before the court's ruling on the demurrer, Sivsa filed its anti-SLAPP motion to strike the fourth cause of action in WIN's cross-complaint.[10] The question raised was whether WIN's fourth cause of action is an improper SLAPP suit. Sivsa claimed it is in that WIN has sued Sivsa for Sivsa's exercise of filing a lawsuit and WIN has no probability of success on its fourth cause of action in that the trial court rejected the Paragraph 16-waiver argument when overruling WIN's demurrer to the FAC. WIN claimed Sivsa failed to meet its burden to demonstrate that the cause fits within Code of Civil Procedure section 425.16 and that WIN can show a probability of prevailing in that the fourth cause of action does not lack the "minimal merit" required by *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93-94, 95. WIN relied on Judge Horowitz's ruling overruling the first demurrer and Judge Grimes' statement that WIN might be right but she "didn't have the resources in chambers to do that research," there was no authority on point, and she was not confident enough about "what the answer is" to sustain the demurrer.

The trial court granted Sivsa's anti-SLAPP motion on January 8, 2003. The minute order stated: "Sivsa's acts in seeking judicial dissolution were taken in furtherance of Sivsa's constitutional right of petition. A cross-complaint alleging a cause of action arising from the plaintiff's act of filing the complaint may be the subject of a C.C.P. section 425.16 motion. This court overruled the demurrer to Sivsa's first amended complaint on the ground that the waiver of the right to seek a decree of judicial dissolution was unenforceable. Thus, defendant and cross-complainant cannot state a

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[9] Manuel Corbi and Manuel Ortiz, principals of Sivsa, were also named cross-defendants on an alter ego theory.

[10] Thereafter, WIN filed a motion to stay action and compel arbitration. The trial court denied the motion to stay action and compel arbitration at the same hearing in which it granted Sivsa's anti-SLAPP motion.

cause of action for right to seek judicial dissolution. Accordingly, the fourth cause of action lacks even minimal merit." WIN appeals the order.[11]

Sivsa subsequently asked this court inter alia to dismiss the appeal. WIN informed this court that it withdrew the portion of the appeal on the ruling regarding arbitration, and we dismissed that part of the appeal as moot on February 4, 2004. We denied Sivsa's motion to dismiss the remaining portion of the appeal; Sivsa argued that in previously denying WIN's petition for writ of mandate following overruling of its demurrer to Sivsa's FAC this court implicitly ruled in favor of Sivsa on the merits. We did not. As the order of February 4, 2004, states, "in general the summary denial of a petition for writ of mandate is not a ruling on the merits that elevates the order to law-of-the-case status. (See *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-895.) This rule is not altered by the inclusion, as we did here, of a 'short statement or citation explaining the basis for the summary denial.' (*Id*. at p. 895.) There is nothing in our summary denial of the writ petition in this case that would justify a departure from the general rule."

CONTENTIONS ON APPEAL

Appellant contends: 1. Sivsa failed to meet its initial burden of establishing the breach of contract cause of action involves an issue of "public interest." 2. Even if Sivsa met its initial burden, WIN established a reasonable likelihood that it will prevail on its breach of contract claim. 3. The award of attorney fees and costs should be reversed. Aside from countering each of WIN's contentions, Sivsa argues that WIN's appeal is frivolous and sanctions should be imposed.

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[11] Sivsa argued that this court's denial of WIN's petition for writ was a binding ruling on the merits.

DISCUSSION

1. Section 425.16.

"Resolution of an anti-SLAPP motion 'requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67 [124 Cal.Rptr.2d 507, 52 P.3d 685] (*Equilon*).)" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733; accord *Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, 1018.) The moving party has the burden on the first issue, and the responding party has the burden on the second issue. (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1364, disapproved on other grounds *Equilon, supra,* 29 Cal.4th 53, 68, fn. 5.)

"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute--i.e., that arises from protected speech or petitioning *and* lacks even minimal merit--is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) On appeal, the issues are reviewed de novo. (Accord *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 44.)

Appellant WIN first contends that the trial court erred in finding Sivsa met its initial burden under the anti-SLAPP statute, which WIN argues is to demonstrate that the action arises from the exercise of the right of free speech or petition *concerning a public issue*. Accurately stating that the lawsuit involves a commercial breach of contract dispute between two private parties, WIN argues that recent Court of Appeal decisions

have "reaffirmed the necessity that the moving party on a SLAPP motion must satisfy the initial burden of establishing that a cause of action arises from the moving party's act in furtherance of a right to petition or free speech in connection with a *public issue*."

WIN misconstrues the law. As Justice Werdegar wrote for our Supreme Court in *Jarrow*, *supra*, 31 Cal.4th 728, 733-734: "In *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 81 Cal.Rptr.2d 471, 969 P.2d 564 (*Briggs*), when first construing the 'arising from' prong of section 425.16, [[12]] we held on the basis of the

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[12] In its entirety, prior to its recent revision through section 425.17, effective January 1, 2004, section 425.16 read:

"'(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

'(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

'(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

'(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

'(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to [Code of Civil Procedure] Section 128.5.

statute's plain language that a defendant moving specially to strike a cause of action arising from a statement or writing made in connection with an issue under consideration in a legally authorized official proceeding *need not separately demonstrate that the statement or writing concerns an issue of public significance.* (*Briggs*, *supra*, at p. 1109.) And in a trio of opinions issued last year, we held that the plain language of the 'arising from' prong encompasses any action based on protected speech or petitioning activity as defined in the statute (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89-95 [124 Cal.Rptr.2d 530, 52 P.3d 703] (*Navellier*)), rejecting proposals that we judicially engraft the statute with requirements that defendants moving thereunder also prove the suit was intended to chill their speech (*Equilon*, *supra*, 29 Cal.4th at p. 58) or actually had that effect (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75 [124 Cal.Rptr.2d 519, 52 P.3d 695])." (Italics added.)

As we next explain, Sivsa has met its burden on the first prong of the anti-SLAPP suit test. WIN's cross-complaint cause of action for breach of contract falls within the class of suits subject to the special motion to strike.

'(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

'(e) *As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law*; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.'" (*Briggs*, *supra*, 19 Cal.4th 1106, 1111, fn. 4 [omitting portions of the statute], italics added.)

2. Cross-defendant Sivsa has sustained its burden of showing that the cause of action for breach of contract in the cross-complaint falls within the class of suits subject to the special motion to strike.

The moving party in an anti-SLAPP motion bears the initial burden of showing the suit falls within the class of suits subject to the special motion to strike. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 964-965.) As our Supreme Court stated in *Navellier v. Sletten*, *supra*, 29 Cal.4th at p.90, a case alleging breach of contract and fraud, "The constitutional right of petition encompasses ""'the basic act of filing litigation.'"" (*Briggs*, *supra*, 19 Cal.4th at p. 1115.)"

However, the mere filing of a lawsuit is not necessarily sufficient to establish the first prong of section 425.16 review. In *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 184, plaintiffs sued the manufacturer of an herbal remedy after plaintiff wife suffered a stroke allegedly caused by her use of defendant's product. The trial court denied the manufacturer's motion to strike plaintiff's complaint under the anti-SLAPP statute, and the Court of Appeal affirmed, holding the manufacturer could not meet the threshold burden to show the claims for product liability, negligence, fraud, and breach of implied warranty were within the ambit of the anti-SLAPP law. Acknowledging the struggle of courts with the first prong of section 425.16,[13] the court analyzed the issue

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[13] "The courts have struggled to refine the boundaries of a cause of action that arises from protected activity. In *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 [124 Cal.Rptr.2d 519, 52 P.3d 695] (*Cotati*), the court explained that "the statutory phrase "cause of action . . . arising from" means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether *the plaintiff's cause of action itself was based on an act in furtherance of* the defendant's right of petition or free speech." (Second italics added.) In *Navellier*, the court cautioned that the 'anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability--and whether that activity constitutes protected speech or petitioning.' (*Navellier*, *supra*, 29 Cal.4th at p. 92, original italics.) Accordingly, the 'arising from' prong encompasses any action *based* on protected speech or petitioning activity as defined in the statute (*Id*., at pp. 89-95), regardless of whether the plaintiff's lawsuit was

and determined, "a defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [Citation.] We conclude it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies (*Cotati*, *supra*, 29 Cal.4th at p. 79), and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." Given that the principal thrust was liability for injuries from selling an unsafe product, the court held the anti-SLAPP protection did not apply even though commercial speech was also involved. (*Id* at p. 188-189.)

Similarly, in *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 627, the appellate court held that an alleged malpractice lawsuit did not arise out of the attorneys' First Amendment right to petition, but rather from "appellants' negligent failure to protect their clients rights in the underlying action" and thus was not within the first prong of section 425.16. The court rejected the attorneys' "attempt to turn garden-variety attorney malpractice into a constitutional right." (*Id*. at p. 632.)

Division Seven's opinion in *Kajima Engineering and Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, which concluded the cross-complaint was not subject to the anti-SLAPP statute, is probably the closest example to the situation in the case at bench. In *Kajima*, an engineering firm brought an action against the City to recover payment for work on construction project; the City filed a cross-complaint, and the engineering firm filed an anti-SLAPP motion. Justice Perluss wrote that "No lawsuit is properly subject to a special motion to strike under section 425.16 unless its allegations arise from acts in furtherance of the right of petition or free speech." (*Id*. at p. 924.)

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intended to chill (*Equilon*, *supra*, 29 Cal.4th at p. 58) or *actually* chilled (*Cotati*, *supra*, 29 Cal.4th at p. 75) the defendant's protected conduct." (*Martinez v. Metabolife Intern., Inc.*, *supra*, 113 Cal.App.4th 181, 186-187.)

Moreover, in *Kajima*, "The amended cross-complaint alleges causes of action arising from Kajima's bidding and contracting practices, not from acts in furtherance of its right of petition or free speech." (*Id*. at p. 929.)[14] Distinguishing *Kajima*, *supra*, 95 Cal.App.4th 921, the court in *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908, stated: "Filing a lawsuit is an exercise of one's constitutional right of petition, and statements made in connection with or in preparation of litigation are subject to section 425.16. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [81 Cal.Rptr.2d 471, 969 P.2d 564].)"

In the case at bench, one party sued for dissolution and breach of contract; the other cross-complained alleging several causes of action including inter alia that the operating agreement between the parties contained a provision prohibiting the dissolution cause of action in the initial lawsuit. Although the lawsuits relate to commercial litigation and the validity of a contractual provision, unlike *Kajima* where the lawsuits arose from bidding and contracting practices, the allegations in the instant case arise from the filing of lawsuits, which is encompassed within the SLAPP statute.

3. WIN has not met its burden in demonstrating probability of success.

As explained above, once Sivsa has shown the lawsuit falls within the anti-SLAPP statute, the burden shifts to WIN to demonstrate the second prong of the SLAPP test, its probability of prevailing on the merits. (See *Navellier v. Sletten*, *supra*, 29 Cal.4th 82, 88-89, 95 and fn. 11; accord *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 584-585, fn. 12 ["The required showing has been termed one of 'minimal merit.']).

WIN contends that nothing in the California Corporations Code prohibits a member of a limited liability company from contractually waiving the right to seek judicial dissolution of the company. (Cf. Corp. Code § § 17005, subd. (b)(4), 17106,

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[14] The court in *Kashian* additionally concluded that plaintiff failed to meet his burden of establishing a probability he would prevail at trial, the second prong of section 425.16.

subd. (h); 17005, subd. (d)(3).) Relying on *Leventhal v. Atlantic Finance Corporation* (1944) 316 Mass. 194, 206 [55 N.E.2d 20], and the lack of statutory preclusion of such waiver in Corporations Code section 17350, 17351, 17005, subdivision (b)(4), and 17106, subdivision (h), WIN asks this court to affirm a corporate shareholder's contractual waiver of the statutory right to seek judicial dissolution of the corporation. Moreover, WIN contends that the conflicting rulings on WIN's demurrer to Sivsa's cause of action for dissolution and liquidation establish the "minimal merit" required by *Navellier*, *supra*.[15]

Corporations Code section 17005, subdivision (a) provides: "Except as provided in subdivisions (b) and (c), relations among members and between the members and the limited liability company are governed by the articles of organization and operating agreement. To the extent the articles of organization or operating agreement do not otherwise provide, this title governs relations among the members and between the members and the limited liability company."

Corporations Code section 17005, subdivision (b) provides: "The effect of the provisions of this title may be varied as among the members or as between the members and the limited liability company by the articles of organization or operating agreement, provided, however, that the provisions of Sections 17059, 17103, 17104, 17152, 17154, and 17155 may only be varied by the articles of organization or a written operating agreement. Notwithstanding the first sentence of this subdivision, neither the articles of organization nor the operating agreement may: [¶] (1) Vary the definitions in Section 17001, except as specifically provided therein. [¶] (2) Eliminate the right of a member pursuant to subdivision (c) of Section 17100 to assert that a provision in the operating

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[15] Where, as here, the question of the ability to waive a statutory right is legal and not factual, the contrasting decisions of two judges ruling on demurrers does not establish the "minimal merit" necessary to meet the burden of the second prong. We must review the legal decision de novo; having done so, as we explain below, we conclude the parties could not agree to waive the right to seek judicial dissolution.

agreement governing the termination of that member's interest and the return of that member's contribution was unreasonable under the circumstances existing at the time the agreement was made. [¶] (3) Vary the voting requirements or voting rights set forth in subdivisions (b) and (c) of Section 17103. [¶] (4) Vary a member's rights under Sections 17106 and 17453."

Thus, according to Corporations Code section 17005, subdivision (a), the operating agreement governs the legal relations among members, with minor exceptions. According to subdivision (b), an operating agreement may not waive or vary certain provisions of the Corporations Code. None of the Code references in subdivision (b) indicate that an operating agreement may not vary or waive the right of a member to seek judicial dissolution, which is governed by section 17351. Therefore, under these provisions, at first glance the statutory scheme seems to allow members to waive the right to seek judicial dissolution.

Nevertheless, Corporations Code section 17005, subdivision (c) provides, in relevant part: "The provisions of . . . Chapter 8 . . . may be varied by the articles of organization or by a written operating agreement *only to the extent expressly provided in those chapters*." (Italics added.) Chapter 8 concerns dissolution, and section 17351 is contained within Chapter 8. Nowhere in section 17351 is there any indication that the right to seek judicial dissolution may be modified or waived in the members' operating agreement. Therefore, under this analysis, it would appear the right of dissolution may not be waived by agreement and that there is no "minimal merit" to WIN's position to the contrary.

4. *Attorney fees and costs*

WIN's argument against attorney fees and costs assumes it is correct that the trial court should not have granted the Sivsa's motion. We conclude that the trial court's ruling was correct and therefore do not disturb the award of attorney fees and costs.

5. *We shall not grant Sivsa's request to impose sanctions for a frivolous appeal.*

Sivsa claims that this appeal is solely for purposes of delay and that sanctions should be imposed on WIN. To the contrary, we have found the appeal to present complex issues on both the first and second prongs of the SLAPP test. Sanctions would be inappropriate.

DISPOSITION

The order granting Sivsa's motion pursuant to section 425.16 is affirmed. The award of attorney fees and costs to Sivsa is affirmed. Sivsa is to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.